

SOUTH AFRICA / JUDGMENT

Pietersen and Others v Drakenstein Municipality and Others (LCC88/2019B) [2023] ZALCC 45 (18 December 2023)

[2023] ZALCC 45

COURT

Land Claims Court

BEFORE

Ncube

CASE / FILE NUMBER

LCC88/2019B

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REPUBLIC OF SOUTH

AFRICA

IN THE LAND CLAIMS

COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: LCC88/2019B

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED: YES/NO

DATE:

18 December 2023

SIGNATURE

In

the matter between:

REGINA
PIETERSEN AND 21
OTHERS
Applicants
and
DRAKENSTEIN
MUNICIPALITY
First
Respondent
GOVERNMENT
OF THE REPUBLIC OF
Second
Respondent
SOUTH
AFRICA
HEAD
OF THE WESTERN CAPE
Third
Respondent
GOVERNMENT
ISEDOR
SKOG
N.O.
Fourth
Respondent
REINETTE
SKOG
N.O.
Fifth
Respondent
HENRIK
COLLINS GERRYTS N.O.
Sixth
Respondent

HEAD:

WESTERN CAPE PROVINCIAL
Seventh
Respondent
DEPARTMENT
OF RURAL DEVELOPMENT
AND
LAND REFORM
SHERIFF
OF THE HIGH COURT (WELLINGTON)
Eighth
Respondent

JUDGMENT

NCUBE J

Introduction

[1] This application serves before me on urgent basis. It is opposed by the first respondent (“the Municipality”) and the fourth to sixth respondents (“the trust respondents”). The second, third and seventh respondents filed notices to abide by the court’s decision. The eighth respondent (“the Sheriff”) is not participating, in this. application. I condoned non-compliance with the rules relating to service and form. I issued directives with regard to the filing of the answering and replying affidavits.

[2] For purposes of this judgment, it is important to list the relief which the applicants seek, which is:

2.1 “Declaring the Municipality to be in contempt of paragraph (d) of this Honourable Court’s order made on 18 February 2021, under case number LCC88/2019 as replaced and/or amended and/or substituted by the Supreme Court of Appeal (“SCA”) on 20 February 2023 under case number 797/2021, (hereinafter referred to as the “order”), for failure to provide the applicants with emergency housing suitable for human habitation with access to basic services (which may be communal), on or before 31 July 2023;

2.2 Extending the time periods in paragraph (b) and (c) of the order to dates and times to be determined by this Honourable Court at the hearing of Part A of this notice of motion, in order to allow the municipality to properly comply with paragraph (d) of the order, by obtaining suitable accommodation, through the utilization of one of its vacant pieces of land mentioned below, alternatively by acquiring one of the vacant pieces of land belonging to either National or Provincial Government and/or Transnet Limited;

2.3 Suspending the operation and execution of paragraphs (b) and (c) of the order, in terms of Rule 65(c) of the Land Claims Court Rules or in the interest of justice, pending the final determination of part A of this notice motion (sic);

2.4 Interdicting and restraining the eighth respondent from executing paragraphs (b) and (c) of the order, pending the final determination of Part A of this notice motion (sic);

2.5 Interdicting and restraining the third (sic) to sixth respondents (“trust respondents”) from cutting the water supply and electricity of the applicants in their respective residential places within the Rein Hill Farm, pending the final determination of Part A of this notice of motion;

2.6 Directing the municipality to properly comply with paragraph (d) of the order read together with section 26(2) of the Constitution by providing the applicants with emergency housing suitable for human habitation with access to basic services (which may be communal), at the hearing of Part A of this notice of motion;

2.7 Directing the municipality to provide emergency housing suitable for human habitation with access to basic services in a location as near as possible to where the applicants currently reside at the Rein Hill Farm, on a date to be determined by this Honourable Court;

2.8 Directing the municipality to utilize one of its vacant pieces of land, situated within its area of jurisdiction in Wellington, namely Erf 2745; or Erf 3836; or Erf 3895 as the vacant land that it will build the applicants emergency accommodation as contemplated in paragraphs (d) of the order read with section 26(2) of the Constitution;

2.9 In the alternative to paragraph 9 (2.8 herein) above, the applicants seek an order directing the municipality to seek the assistance and support of the Department of Rural Development and Land Reform in terms of clause 7.1(c) of its policy and the assistance of the Provincial Government, the owner of the two vacant pieces of land situated within its area of jurisdiction, namely: Erf 553, or Erf 4044, as one of the emergency housing as contemplated in paragraph

(d) of the order, read with subsections 41(1)(b) and 41(1)(l)(ii) and further read with section 26(2) of the Constitution;

2.10 In the further alternative to paragraph 9 (2.8 herein) above, the applicants seek an order directing the municipality to seek the assistance and support of the National Government as the owner of the vacant piece of land situated within its area of jurisdiction, namely: Erf 6411, as a piece of land that it can acquire in order to provide the applicants with emergency housing as contemplated in paragraph (d) of the order, read with subsections 41(1)(b) and 41(1)(l)(ii) and further read with section 26(2) of the Constitution; and

2.11 In the further alternative to paragraph 9 (2.8 herein) above, the applicants seek an order directing the municipality to acquire the vacant piece of land belonging to Transnet Ltd Erf 512, as a vacant piece of land that the municipality can use to provide the applicants with emergency housing as contemplated in paragraph (d) of the order, (sic) read with section 26(2) of the Constitution;

2.12 Directing the respondent who unreasonably opposes the relief sought above, to pay the costs of this application; and

2.13 Granting the applicants any further and/or alternative relief.”

Facts

[3] The applicants are and have always been occupiers of Rein Estate Hill, remainder of farm 1458, Drakenstein Municipality Paarl Division, Western Cape (“the farm”). The said farm was owned by Amen Trust since 1995. In 2010, the current owner, the Rein Trust (“the Trust”) purchased the farm. The applicants, or some of them were former employees of the Amen Trust who were taken over by the Trust. Several residential cottages were constructed on the farm for occupation by employees. The applicants resided in nine (9) cottages on the farm. Each cottage was occupied by a former employee with his or her family. The applicants’ right of occupation of the cottages was linked to their employment relationship with the

Trust.

- [4] The applicants took part in unprotected strike. They were then dismissed from work. Their employment relationship with the Trust formally came to an end on 24 June 2011 and they were ordered to vacate the farm. They did not vacate. Another notice to vacate the farm was issued on 21 May 2012, but all was in vain. The Trust approached the magistrate's court for an eviction order. The application was dismissed, on the basis that the Trust failed to show that the occupiers' right of residence had been lawfully terminated.
- [5] In May 2018, occupiers in every household were served with notices informing them that the Trust intended terminating their right of occupation and calling upon them to make representations. No representations were made. In July 2018 occupiers were served with notices of termination of residence and they were called upon to vacate the farm within thirty days. None of the occupiers vacated the farm. On 19 June 2019, the Trust approached this court, seeking the eviction of the occupiers. The application was premised on the breakdown of the relationship between the occupiers and the Trust. On 18 February 2021 the application was dismissed on the basis that the Trust could not prove which of the occupiers was guilty of the atrocities complained of in the Trust's founding affidavit.
- [6] Aggrieved by the order of this court, the Trust appealed to the Supreme Court of Appeal ("the SCA"). The SCA upheld the appeal, set aside this court's order of 18 February 2021, granted the eviction of the occupiers and ordered them to vacate the farm on or before 31 August 2023. The municipality was ordered to provide to the applicants emergency housing suitable for human habitation, with access to basic services, which may be communal on or before 31 July 2023.
- [7] On 8 August 2023, the applicants instituted an application in the Western Cape High Court seeking relief which was identical to the one they are seeking in this case. That application was dismissed. It is not entirely clear why they had approached the High Court and not this court in the first place. The application was dismissed on 28 August 2023.
- On 30 August 2023, the applicants then approached this court seeking substantially identical relief.

Issues

- [8] The bone of contention in this matter and the main one, is whether this court has jurisdiction to interfere with the orders of the SCA? Can this court suspend the operation of an order of the SCA? Can this court vary or extend the timelines set by the SCA? Can this court add an order which was not made by the SCA? The applicants have answered

these questions in the affirmative. The first and fourth to sixth respondents have answered them in the negative.

[9] The applicants heavily rely for their submissions on the decision of Froneman J in *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another*[1]

In that case Froneman J expressed himself in the following terms: -

“7 It is usual that in a successful appeal, the appellate court may make the order that the court of first instance should have made. That order then becomes the order of the court of first instance. Execution and enforcement of the order should then take place in that court.

8 This court has jurisdiction to hear matters other than as a court of appeal. *Blue Moonlight I* was, however, not that kind of case. It was an appeal against the judgment of the Supreme Court of Appeal. Paragraph (e) of the order made it clear that it was a usual ‘set aside and replace’ kind of order made in an appeal. It effectively became an order of the High Court.

9 The reason for enforcing orders in the original court is logical and practical. The order on appeal merely corrects the original order and the court of first instance is usually best equipped to deal with matters relating to enforcement of that order.”

Discussion

[10] For purposes of this judgement, I find it unnecessary to deal with all point in limine which are raised herein. Lack of jurisdiction disposes the matter. This court is a creature of statute, it derives its powers from the statute which creates it. This court is created by the Restitution of Land Rights Act[2] (“the Act”). Section 35(11) of the Act provides: -

“The Court may, upon application by a person affected thereby and subject to the rules made under section 32; rescind or vary any order or judgment granted by it.[3]

- (a) in the absence of the person against whom that order or judgement was granted;
- (b) which was void from its inception or was obtained by fraud or mistake common to parties;
- (c) in respects of which no appeal lies; or
- (d) in the circumstances contemplated in section 11(5):

Provided that where an appeal is pending in respect of such order, or where such order was made on appeal, the application shall be made to the Constitutional Court or the Appellate Division of the Supreme Court as the case may be.”[4]

This provision makes it clear that this court has no jurisdiction to interfere with orders of the SCA. Let alone adding an order directing the municipality to negotiate with other State Departments to purchases a piece of land for the applicants.

[11] Apart from Section 35(11) discussed above, Rule 65(3) provides that the court may suspend an order of the court for a given period or until the happening of a particular event. In terms of this Rule I can only suspend the order which was made by the Land Claims Court and only for a specified period. In casu, the applicants seek the order to suspend the SCA order for an indefinite period or pending the success of negotiations to purchase a piece of land to be used for the settlement of the applicants.

[12] May be the Saratoga judgment could apply only in case of contempt of court. However, I cannot find that the municipality is guilty of willful and mala fide contempt of court. The municipality has made attempts to make emergency accommodation available to the applicants. The applicants

have been uncooperative and have been making unreasonable demands. The applicants have made it clear that they would not take accommodation at Schoongeziaht. Parties conducted site inspection and they were shown a structure which is shown on the photograph annexure P9, but they rejected it. Despite the fact that the SCA said applicants may share the facilities, the applicants want each structure to have its own toilet. They have chosen the land where they wish to be accommodated. In *Cape Town City v Commando and Others*[5] the court held that there is no constitutional duty on the Local Authority to make emergency accommodation available at a specific

place.

[13] However, the municipality must note that it has not discharged its obligation in terms of the order of the SCA. The municipality only made an offer of emergency accommodation it did not make accommodation available to the applicants. It is not good enough to say the offer is available till 01 December 2023. The SCA order in paragraph (d) thereof, says the municipality must provide emergency housing suitable for human habitation with access to basic services which maybe communal. In my view, that obligation will be discharged once the municipality has built the structures and has told the applicants' legal representatives and the Trust that the structures are now available and ready for occupation. The Trust can then instruct the Sheriff to execute the order and move the occupiers' belongings to the structures so provided. I can only advise the municipality to do so atleast by the end of February

2024. The obligation still stands and it has not been discharged.

[14] The applicants must also take note of the fact that the SCA did not, in its order say that paragraph

- (b) of its order is dependent on paragraph (d) thereof. In other words, there is no specific order to the effect that if the municipality fails to provide emergency accommodation, then the eviction may not occur. Again it is not in the order of the SCA that the municipality must provide emergency housing closer to the applicants' present place of residence. That is inferred from the judgment, which inference might be wrong. The order does not say so. That does not form part of the orders

Costs

- [15] The norm in this court is not to make costs orders unless there are exceptional circumstances justifying a cost order. In this case there are no special or exceptional circumstances justifying a departure from the norm.

Order

- [16] In the result, I make the following order;

1. The application is dismissed,
2. There is no order as to costs.

Judge of the Land Claims Court of
South Africa, Randburg

Judgment

reserved: 3 November 2023

Judgment delivered: 18 December 2023

Appearances

For Applicants: Adv Dzai, L Instructed by: Wakaba and Partners Randburg For First Respondent: Adv Greig, M Instructed by: Van Der Spuy & Partners Paarl For Fourth to Sixth Respondents: Adv Wilkin, L Instructed by: Meyer & Sarkas Attorneys Cape Town

- [1] (CCT 12/12 [2012] ZACC9 par 7.
[2] Act 22 of 1994.
[3] My own emphasis.
[4] My own emphasis.
[5] 2023
(4) SA 465 (SCA)

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